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BRIEF FOR PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 61.

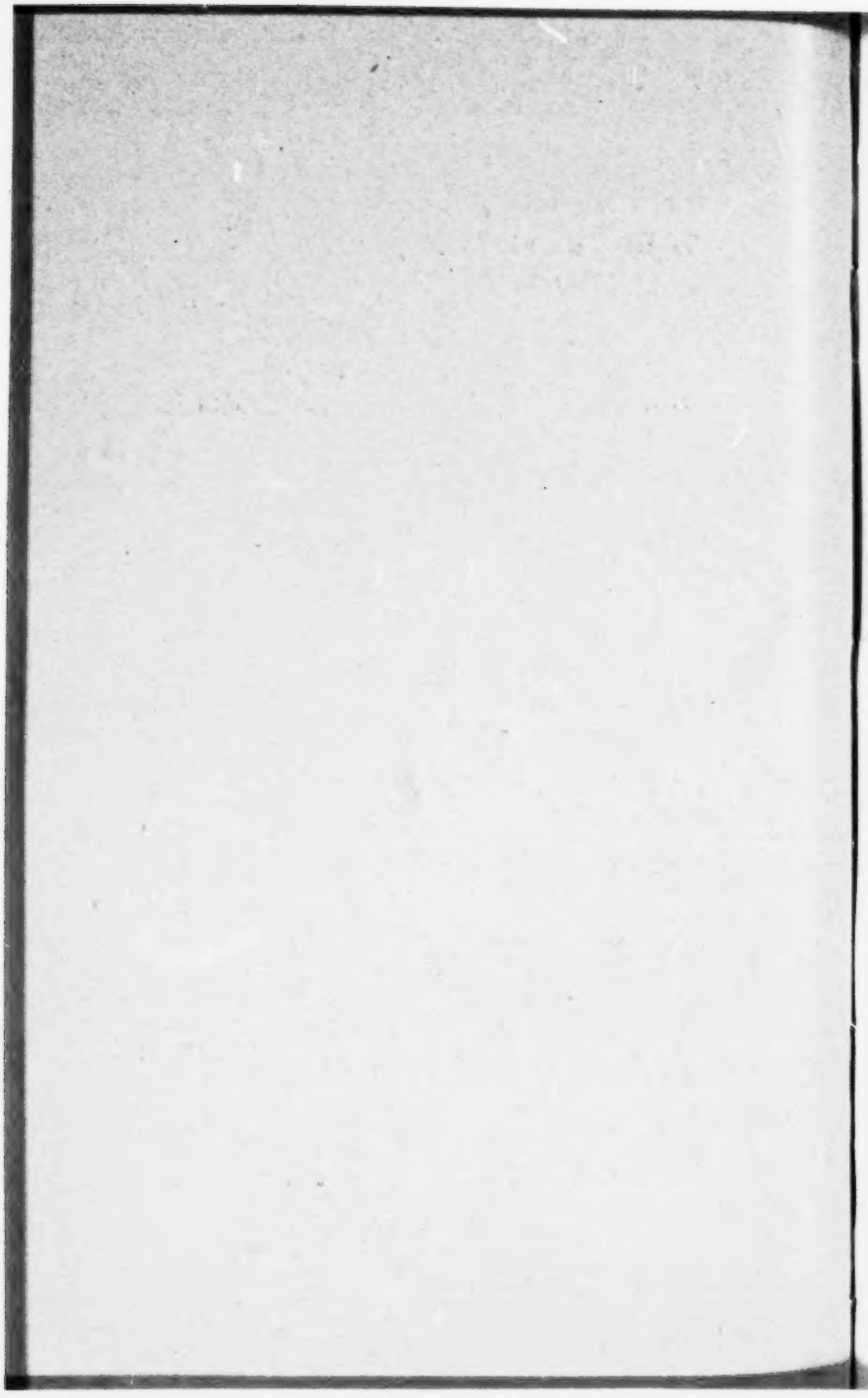
THE GRAND RAPIDS AND INDIANA RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

CHASE S. OSBORN, COMMISSIONER OF RAILROADS OF THE STATE OF MICHIGAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

T. J. O'BRIEN,
JAMES H. CAMPBELL,
For Plaintiff in Error.



In the Supreme Court of the United States.

THE GRAND RAPIDS & INDIANA RAILWAY COMPANY,
Plaintiff in Error,
vs.
CHASE S. OSBORN, Commissioner of Railroads of the State of Michigan.

BRIEF FOR PLAINTIFF IN ERROR.

I. Statement of the Case.

This case comes before the court upon writ of error, to the Supreme Court of the state of Michigan, to review the final judgment of that court, affirming an order of the circuit court for the county of Kent, that a peremptory writ of mandamus issue to compel the railway company, plaintiff in error, to reduce the rates of passenger fares on its railroad to two and a half cents per mile, the rate fixed by a statute of the state.

The provisions in the constitution of Michigan, and the section of the statute under which this proceeding was instituted, appear in full in the printed record, pages 8 and 9.

The Supreme Court of the state, in the case of *Weliman vs. the Chicago & Grand Trunk Railway Company*, 83 *Mich.*, 592, construed these provisions and decided that under the provision in the constitution, the legislature is the exclusive and final judge of what are reasonable maximum rates of charges for the transportation of passengers on all railroads in the state; that the action of the legislature in fixing maximum rates, is final and conclusive upon the companies and the courts, and

that the reasonableness of such rates as fixed by the act of the legislature is not subject to review or inquiry by the courts. This construction was adhered to, and the rate enforced, upon the Wabash Railroad Company by peremptory mandamus in a suit by the commissioner of railroads of the state against that company in April, 1900. 123 Mich., 669, and supplementary opinion, 126 Mich., 113.

In the opinion in the Wabash case, filed April 24, 1900, it was decided that "The gross (annual) earnings of passenger trains," within the meaning of the statute, must include moneys received for carrying the mails and express (123 Mich., 669.), and in the supplementary opinion, filed March 26, 1901, that it is competent for the railroad commissioner, in fixing the rates which the several companies may charge, under the statute, to include in the computation the amount of inter-state fares earned by that portion of the road lying within the state of Michigan. (126 Mich., 113.)

Under another statute of the state, railroad companies are required to make a report, on the first day of April, in each year, to the commissioner of railroads, of their earnings, in detail, for the preceding year ending December 31st, upon blanks prepared and furnished by the commissioner.

The report of the railway company, plaintiff in error, for the year 1900, made according to this form, showed that the earnings of its passenger trains in that year, including the so-called Michigan proportion of earnings from inter-state business, exceeded $2,000 per mile of road.

Proceedings, Pleadings, and Judgment in the State Courts.

On the 13th day of July, 1901, there was filed in the circuit court for the county of Kent, the petition by the commissioner of railroads of the state, which appears in the printed record, pages 3-5.

On filing the petition, the circuit court made an order requiring the company to show cause, on the 26th day of July,

why a peremptory writ of mandamus should not be issued, as prayed in the petition. (R. 6.)

The hearing was adjourned until Aug 9th.

On that day the answer of the respondent was filed. It appears in the record, pages 7-22.

The answer sets forth fully the constitutional and statutory provisions and their construction by the Supreme Court of the state (par. 1, pages 8-11), and alleges that the provisions as so construed are in violation of the constitution of the United States, Sec. 1, Art. XIV, amendments, that the rate sought to be enforced is unreasonable and inadequate, and that its enforement upon the respondent would deprive it of its property, without due process of law, and deny to it the equal protection of the laws, in violation of the XIV amendment (par. III, p. 11-12, par. IV., p. 12-13; par. VI. and VII, p. 13-17), and that the statute as construed is in violation of the Commerce Clause in the National Constitution. (par. V, p. 13.)

The proceedings on the filing of this answer appear in the record, pages 23-26. The attorney general of the state, appearing for the petitioner, asked leave to file a demurrer to the answer, on the ground that the defendant, by its organization in 1896, under the general railroad law, entered into a contract with the state, one of the conditions of which was that it should carry passengers at the rates fixed by the law. Leave to file the demurrer was granted. It was then stipulated that the defendant might amend its answer, setting forth more fully the facts relative to its incorporation, and par. VIIA in the answer (Rec. p. 17-22), was added.

The attorney general, on the 10th day of August, filed the demurrer, which appears in the Record, p. 26-27.

The case was submitted to the court on briefs.

On the 9th day of September the circuit court made the order that the defendant did enter into a contract with the state, and that the writ of mandamus issue as prayed. (Rec. 27.)

The defendant filed in the Supreme Court of the state a petition for writ of certiorari to review that order. (Rec. p. 1-3.)

The writ was allowed, returnable November 14. Return

having been made, the Supreme Court set the case down for hearing on December 10th. On that day it was submitted on printed briefs.

On the 17th day of December the attorney general filed a motion for leave to file an amended demurrer. This motion, with the proposed amendment, appears Record p. 56-57. The amendment consists of the further ground of demurrer, that upon its incorporation in 1896, under the general railroad law, the respondent became subject to that law and the provision therein fixing rates of passenger fares, said provision being one of the conditions of its existence. The defendant filed objections to the amendment. (Rec. p. 58-59.)

No action was taken on the motion to amend, until the decision of the case by the court on the 8th day of April. The respondent was not heard on the question presented by the amendment to the demurrer.

On that day the court filed its opinion (Rec. p. 62-64), and on the same day judgment was entered affirming the order of the circuit court, sustaining the demurrer as amended, and that mandamus issue. (Rec. 64-65.)

Statement of the provisions in the law, and the circumstances under which the respondent became incorporated.

1. The constitution of the state, adopted 1850, provides that "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All laws passed pursuant to this section may be amended, altered or repealed."

2. A general law for the incorporation of railroad companies was passed in 1855.

3. The railroad now owned by the respondent, was built in 1870-1874, by a corporation organized under that law. It extends from Ft. Wayne, Indiana, to the straits of Mackinac, in Michigan.

4. In 1873, an act to revise the laws providing for the incorporation of railroad companies was passed. That law,

with amendments of some of its sections, is still in force. It contains more than one hundred sections, divided into five articles. Its provisions relate to many subjects, taxation, police regulations, liability for causing death, etc.

It is found in the compiled laws of Michigan, 1897, Vol. 3, Chapt. 164, pages 1937-2000.

Section 11, Article V, provides that "This act may at any time be altered, amended or repealed, but such alteration, amendment, or repeal, shall not affect the rights of property of companies organized under it."

Section 13, article V, repeals the general law of 1855, and provides that the organization of all corporations under the provisions of said act, "shall be deemed and taken to be organizations under this act."

Section 9, article II, sub-div. 9, provided that the tolls and compensation to be paid for transporting any passenger and his baggage should not exceed three cents per mile.

(Three cents per mile was the rate uniformly charged on the railroads of the state, excepting those in the upper peninsula.)

This provision continued in force until amended in 1889.

Section 38 in article II provides that all companies organized under the act, shall have power from time to time to borrow money, and to issue their bonds or obligations therefor, and to mortgage their corporate property and franchises, and the income thereof, or any part thereof, to secure the payment of the same.

Section 2, article I provides that:

> "In case of the foreclosure and sale of any railroad, or part of any railroad, under any trust deed or mortgage given to secure the payment of bonds sold to aid in its construction and equipment, or for other cause authorized by law, it shall be competent and lawful for the parties who may become the purchasers, and such others as they may associate with themselves, to organize a corporation for the management of the same, and issue stock in the same in shares of $100.00 each to represent the property in said railroad, *and such corporation, when organized, shall have the same rights, powers, and privileges as are*

or may be secured to the original company whose property may have been sold under and by virtue of such mortgage or trust deed. Such organization may be formed by (a certificate containing certain statements, and signed by the purchasers, and filed in the office of the secretary of state) and thereupon the said corporation shall become complete, with all the powers and rights secured to railroad companies under this act, *to all the provisions of which, and amendments thereto, they shall be subject.*

The foregoing provisions still remain in the law, excepting that in section 9 as to rates, which was amended in 1889.

5. The incorporation of the company which built the railroad and then owned it, passed, by operation of the law under the act of 1873. (Sec. 12 and 13, C. L., page 1998.)

6. In 1872 the chapter of the general statutes, entitled, "General provisions relating to Corporations," was amended by adding a new section, 26, as follows: (C. L. 1897, Vol. 3, page 2631, sec. 8552.)

(8552.) Sec. 26. "Whenever any corporation, now existing or hereafter formed, may have conveyed all their corporate property, real and personal, together with their franchises, growing out of or appertaining thereto, or together with all their corporate franchises, by way of mortgage or deed of trust, in case of the sale of the same thereunder, the purchasers at such sale and their associates, shall be entitled to have and exercise all the privileges and franchises held by such corporation, and shall be deemed and taken to be the true owners of its corporate rights, and to be corporators vested with all the rights, powers, and privileges, and benefits conferred by law or the statutes of this state upon such corporations, in the same manner, and to the same extent, as if they were the original incorporators at the formation of such corporation; *and they shall*, within thirty days after such sale shall become absolute, file articles of association, together with a copy of the order confirming the sale, in the office of the secretary of state; and they shall hold title to and enjoy all property acquired by, or donated to, such corporation, which may have been purchased by them at such sale; and such successor corporation may issue, and themselves hold, new stock in said corporation, to such an amount and of such denomination, as was prescribed in the articles of association, or charter of the original corporation. After filing the new articles of association, as required

by this act, the old officers of said corporation shall be superseded, and the old stock in said corporation shall be deemed forfeited and extinguished, and may be canceled on the books of said corporation; and the new stockholders, and the officers by them chosen or elected, shall, in the law, be deemed and taken to be the stockholders and officers of said corporation, and the said corporation shall not be liable for any debts or obligations, except those by it thereafter contracted. But no prior mortgage or lien shall be in any way affected by such proceedings. * * Provided, that in making such sale, the property essential to the exercise of corporate rights, together with the corporate franchises, shall be deemed an entire thing, and shall be sold as such.

7. August 1, 1884, the original company made a mortgage of the property, to secure bonds, amounting to $3,000,000. This was subject to a first mortgage of an earlier date for about $6,000,000, which is still a lien upon the property.

8. In 1889, sub-div. 9 of section 9, article II, relating to rates to be charged for passenger fares, was amended to prescribe the two cent, two and a half, and three cent rates, according to gross earnings of passenger trains. (Rec. 8 and 9.)

9. In 1891 section 9 was amended in other parts, and re-enacted as amended, but no change was made in sub-division 9, relating to rates. The amendment as to rate is sometimes referred to as the law of 1891.

10. Ju[illegible], 1896, the railroad property was sold under decree of the United States circuit court, in foreclosure of the mortgage of August 1, 1884, to John C. Sims (subject to the $6,000,000 first mortgage). The amount of outstanding bonds secured by that mortgage is $5,375,000.

11. July 7, 1896, Sims, the purchaser, and others associated with him, executed the certificate acording to section 2 in article I of the railroad law, and it was filed in the office of the secretary of state on the 11th day of July, 1896. Thereby the respondent corporation was incorporated, and became the owner of the property.

12. April 24, 1900, the Supreme Court of the state decided that the gross earnings of passenger trains, under the statute,

must include receipts for mails and express, and March 26, 1901, that, for the purpose of determining what domestic fare shall be, gross earnings should include the Michigan proportion of earnings from inter-state business, to be added to domestic earnings.

II. Errors Relied On.

The Supreme Court of Michigan, in its final judgment, erred:

1. In ordering that peremptory writ of mandamus issue to compel the plaintiff in error to reduce the rates of passenger fares on its railroad to two and one-half cents per mile, the rate fixed by a statute of Michigan, thereby enforcing upon it a rate alleged and admitted by the pleadings to be unreasonable, and to be inadequate compensation for the transportation and which would deprive it of the right of charging reasonable rates for the use of its property, contrary to the provisions in the XIV amendment to the constitution of the United States, and therby overruling the objections of the plaintiff in error in its answer to the petition that the statute itself, and the enforcement of the rate against the company, are contrary to those provisions.

Assignment of Error I, Rec. 69.

2. In overruling the objection in the answer, paragraph 1, that the provisions in the constitution and statutue of Michigan, relating to rates for passenger fares, as construed by the Supreme Court of the state, are in violation of that provision in the constitution, for the reasons that the state constitution provides that the legislature may establish reasonable rates of fares; the statute fixes the rates, and the Supreme Court of the state has held that the legislature is the final judge of what are reasonable rates, and that the matter is not subject to review or inquiry in the courts.

Assignment of Error II, Rec. 69.

3. In overruling the objection in the answer, paragraph 1, that the statute in its terms, and as construed and enforced, is in violation of said provision in the constitution, for the reasons that it imposes the rates arbitrarily and finally, without any

provision for an inquiry or proceeding to determine whether they are in any case reasonable or not, and the courts of the state enforce the rate by peremptory mandamus, based upon the statute itself.

Assignment of Error III, Rec. 70.

4. In overruling the objections in the answer, paragraphs III, IV, VI, and VII, that the rate would be unreasonable and inadequate compensation for the transportation upon this railroad, and that the enforcement of the rate upon the plaintiff in error would deprive it of its property, and of reasonable compensation for the use thereof, in violation of the provision in the fourteenth amendment to the constitution.

Assignments of Error IV and V, Rec. 70.

5. In overruling the objection in the answer, paragraph V, that the statute, as construed by the Supreme Court of the state, in its decision that part of the inter-state fares must be included in the earnings, operates as an interference with a regulation of commerce among the states, in violation of the provision in the constitution of the United States, which vests in Congress exclusive power to regulate such commerce.

Assignment of Error VI, Rec. 71.

6. In sustaining the demurrer as amended in the Supreme Court, to the respondent's answer.

Assignment of Error XI, Rec. 73.

The Assignments of Error VII, VIII, IX, X, XII, XIII, XIV, XV, XVI, XVII, XVIII, and XIX (Rec. 71-75), relate to this action, and to the points involved in it.

III. Points of Fact and Law.

We submit the case upon the following five propositions. They cover all the errors assigned and relied on:

1. The rate two and one-half cents per mile for passenger fares upon the railroad of the plaintiff in error, which the writ of mandamus would enforce upon it, must upon this hearing be held to be unreasonable and unjust, and inadequate compensation as matter of fact. It is so alleged in the answer, paragraphs III, IV, and VI (Rec. 11-13). These allegations are admitted to be true by the demurrer to the answer.

2. The enforcement of that rate upon the plaintiff in error, by the writ of mandamus which the Supreme Court of Michigan has ordered to be issued, would deprive respondent of its property without due process of law, and deny to it the equal protection of the laws, in violation of the constitution of the United States, amendment XIV, sec. 1.

3. The statute of Michigan prescribing maximum rates of passenger fares, as construed by the Supreme Court of the state, is repugnant to the XIV amendment, sec 1, of the National Constitution.

4. The statute, as construed by the Supreme Court of the state, violates the commerce clause in the National Constitution. The Supreme Court has decided that gross earnings, for the purpose of applying the rates to be charged for domestic fares, must include part of the inter-state earnings from passengers, mails and express.

5. The Supreme Court of Michigan erred in sustaining the demurrer (as amended in that court) to the answer of the defendant.

IV [CITATION OF AUTHORITIES, AND ARGUMENT IN SUPPORT OF THE FIVE PROPOSITIONS ABOVE STATED.]

I.

First point. That the rate in question will, upon this hearing, be held to be unreasonable as matter of fact.

It is admitted by the demurrer to the answer.

164 U. S. 578,592; the Covington & Lexington Turnpike Road Co., vs. Sanford.

This fact is conceded by the Supreme Court of Michigan in its opinion deciding this case. It is said "the answer states that the rate of fare, two and one-half cents per mile, is unreasonable and inadequate, and this statement is admitted by the demurrer to the answer.

II.

Second point. The enforcement of that rate upon the plaintiff in error would deprive it of its property without due process of law, and deny to it the equal protection of the laws, in violation of the XIV amendment, section 1.

134 U. S., 418, Chicago, Milwaukee & St. Paul R. Co. vs. the state of Minnesota.

134 U. S., 467, the Minneapolis Eastern R. Co. vs. the state of Minnesota.

154 U. S., 362, Reagan vs. the Farmers' Loan & Trust Co.

154 U. S., 413-420, three cases following the last cited.

164 U. S., 578, Covington & Lexington Turnpike Road Co. vs. Sandford.

169 U. S., 466, Smyth vs. Ames.

173 U. S., 684, Lake Shore & Mich. Southern R. Co. vs. Smith.

176 U. S., 167, Chicago, Milwaukee & St. Paul R. Co. vs. Tompkins.

143 U. S., 339, Chicago & Grand Trunk R. Co. vs Wellman.

III.

Third point. The statute of Michigan, prescribing maximum rates of passenger fares, as construed by the Supreme Court of the state, is repugnant to the XIV amendment, section 1, of the National Constitution.

The statute declares what the maximum rate shall be. The Supreme Court, in the Wellman case, 83 Mich., 592, and the Wabash case, 123 Mich., 669, and 126 Mich., 113, decided that the legislature is the exclusive and final judge of what are reasonable maximum rates, and that the reasonableness of the rates fixed by the statute, is not subject to review or inquiry in the courts.

The statute so construed violates the XIV amendment. It is the same in this respect as the statute of Minnesota, which was held by this court to be in conflict with that constitutional provision in *134 U. S., 418, Chicago, Milwaukee & St. P. R. Co. vs. the State of Minnesota.* The decision in that case upon this point is in these words:

> "The construction put upon the statutue by the Supreme Court of Minnesota must be accepted by this court for the purposes of the present case as conclusive.
>
> 'That court authoritatively declares that it is the expressed intention of the legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed out by the act, are final and conclusive as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made, or inquiry to be had, as to their equality or reasonableness in fact.
>
> 'This being the construction of the statute, we are of opinion, that so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation, judicially, of the truth of a matter in controversy."

It is settled by the decisions of this court that the question whether rates of fares prescribed by a statute of a state are in any case reasonable or not, is one for judicial inquiry and determination.

134 U. S., 418, 457, C., M. & St. Paul R. Co. vs. Minnesota.

154 U. S., 362, 397 and 399, Reagan vs. the Farmers' L. & T. Co.

156 U. S., 649, 657, St. L. & S. F. R. Co. vs. Gill.

169 U. S., 466, 527, 528, Smyth vs. Ames.

The method of establishing rates, undertaken by the Michigan statute, has all the features of the Minnesota plan, for which the latter was condemned, and to a more objectionable degree. The Michigan statute neither contemplates nor allows any inquiry regarding the reasonableness of the rates. It provides that railroad companies, upon notification from the commissioner of railroads, shall reduce their rates to two and one-half or two cents per mile, as the case may be. The Supreme Court has declared that the legislature is the final judge of what rates are reasonable, and compels companies by mandamus to adopt the rates stated in the notice by the commissioner. That construction was given to the statute in the Wellman case, 83 Mich., 592, in the opinion, pages 620-621, and has never been modified nor withdrawn. It was enforced against the Wabash Company by mandamus.

The court, in making that decision, had before it the decision of this court in the Minnesota case, 134 U. S., 418, and it is discussed in the opinion, 83 Mich., 613-620. The effect of the decision was entirely misapprehended. It is said (page 620) "The decision in the Minnesota case rests not on the right of the legislature to declare what is a reasonable maximum rate, but upon its right to authorize a commission to do so," and "there are many things that a legislature can do that it cannot delegate to any other body, and it would seem, in the opinions of the Supreme Court of the United States, that this is one of them." This view of the decision of this court is erroneous. The principle declared in that case, and upon which it was decided, applies as well to the action of the legislature in fixing the rates as it does to that of a commission appointed by the legislature. The rates enjoined in 164 U. S., 578, were those fixed by the legislature of Kentucky.

IV.

Fourth point. The statute of Michigan, fixing the maximum rates for passenger fares at three, two and one-half, and two cents per mile, according to the gross earnings of passenger trains, as construed by the Supreme Court, violates the provision in the constitution of the United states, article 1, section 8, clause 3, relative to inter-state commerce.

The construction is that in determining what rate for domestic fares shall be charged by any railroad company, it is competent to include in the gross earnings of its passenger trains the amount of inter-state fares earned by that portion of the road lying within the state of Michigan.

> Commissioner of Railroads vs. the Wabash R. Co., 126 Mich., 113.

This point is made in the answer, paragraph V, Rec. 13.

It is there alleged that the respondent is a corporation, organized under the laws of Michigan and Indiana; that it owns and operates a railroad running from Ft. Wayne, Indiana, to the straits of Mackinaw, in the state of Michigan; that it is engaged in inter-state commerce, and subject to the laws of the United States regulating such commerce; that a large part of the earnings of the company is derived from inter-state commerce for the transportation of persons and express matter, and the United States mails, and that excluding from its earnings the so-called Michigan proportion of the earnings of its passenger trains in inter-state business, the earnings of its passenger trains in 1900 (upon which this proceeding is based) would be much less than $2,000 per mile of road.

These allegations are admitted to be true by the demurrer to the answer.

The statutory rates apply to domestic fares only.

But the rate to be charged by any company, of the three rates named in the statute, is determined by the gross earnings of passenger trains, and under the decision, receipts from inter-state business are included in the computation of gross earnings for the purpose of applying the rate for fares within the state. The result of this will interfere with inter-state rates, and may

directly affect them by compelling an increase in them to offset the deficit caused by the reduction of state fares to an unreasonable rate.

The construction of the statute, as stated, violates the commerce clause in the constitution.

169 U. S., 466, Smyth vs. Ames.

> In this case it is said (page 541) that, "the reasonableness or unreasonableness of rates prescribed by the state for the transportation of persons and property wholly within its limits, must be determined without reference to the inter-state business done by the carrier, or to the profits derived from it."

That statement was made in discussing the point made by the appellants (the state board of transportation). The entire paragraph (pages 540-541) is:

> "It is further said in behalf of the appellants, that the reasonableness of the rates established by the Nebraska statue is not to be determined by the inquiry whether such rates would leave a reasonable net profit from the local business affected thereby, but that the court should take into consideration, among other things, the whole business of the company, that is, all its business, passenger and freight, inter-state and domestic. If it be found, upon investigation, that the profits derived by a railroad company, from its inter-state business alone, are sufficient to cover operating expenses on its entire line, and also to meet interest, and justify a liberal dividend upon its stock, may the legislature prescribe rates for domestic business that would bring no reward, and be less than the services rendered are reasonably worth? Or, must the rates for such transportation as begins and ends in the state be established with reference solely to the amount of business done by the carrier wholly within such state, to the cost of doing such local business, and to the fair value of the property used in conducting it, without taking into consideration the amount and cost of its inter-state business, and the value of the property employed in it? If we do not misapprehend counsel, their argument leads to the conclusion that the state of Nebraska could legally require local freight business to be conducted even at an actual loss, if the company earned on its inter-state business enough to give it just compensation in respect to its entire line and all its business, inter-state and domestic. We cannot concur in this view. In our judgment, it must be

held that the reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons and property wholly within its limits, must be determined without reference to the inter-state business done by the carrier, or to the profits derived from it. The state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its inter-state business, over which, so far as rates are concerned, the state has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its inter-state business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on inter-state business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the state, that the state can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business. The argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for out of, a common fund; and that its capitalization is on its entire line, within and without the state, can have no application where the state is without authority over rates on its entire line, and can only deal with local rates, and make such regulations as are necessary to give just compensation on local business."

If it is not competent, as it was here decided that it is not, to consider inter-state business in determining the reasonableness of statutory rates for local fares, it must be much less competent to actually include inter-state earnings, or any part of them, in the computation which is the basis of the local rate to be charged, as is done in Michigan under the decision of the Supreme Court.

184 U. S., 27, Louisville & Nashville R. Co. vs. Eubank.

This was a suit brought in a state court of Kentucky against the railroad company, a corporation organized under the laws of Kentucky (see 183 U. S., 503) to recover the amount of freight paid for a local shipment in excess of the rate limited

by a provision in the constitution of Kentucky that it should be unlawful for a carrier to charge more for a shorter than a longer haul over the same line in the same direction. The longer haul adopted by the state court in its decision in favor of plaintiff as limiting the charge for the shorter haul within the state, was from a point in the state to a point in another state. This court reversed the judgment, and held that, as construed by the state courts, the provision in the constitution of the state did affect inter-state commerce, although the limitation of the rates to be charged applied only to shipments wholly within the state. In the opinion are the following statements:

> "The effect of the decision by the state court is to hold that the provision of the state constitution is not confined to a case where the long and short hauls are both within the state of Kentucky." (Page 33.) "The foundation upon which the validity of the constitutional provision is based is the theory that it operates solely upon the rate within the state." (Page 34.) "If the state of Kentucky has the right to base its provision for the rate of a short haul within its own borders, by comparison with the rate for a long haul partly within and partly without its own borders, notwithstanding the direct effect of the limitation arrived at by such comparison, may be the regulation, or even the suppression, of the inter-state commerce of the carrier, then this provision is valid; otherwise it would seem to be the reverse." (Page 35.) "The vice of the provision lies in the regulation of the rates between points wholly within the state, by the rates which obtain between points outside of and those which are within the state." (Page 41.) "But the fact which vitiates the provision is that it compels the carrier to regulate, adjust, or fix his inter-state rates with some reference, at least, to his rates within the state, thus enabling the state, by constitutional provision or by legislation to directly affect, and in that way to regulate, to some extent, the inter-state commerce of the carrier, which power of regulation the constitution of the United States gives to the Federal Congress."

118 U. S., 557, Wabash, St. Louis & Pacific R. Co. vs. The People of the State of Illinois.

In this case the judgment of the Supreme Court of Illinois, affirming a judgment for the penalty prescribed by a statute of the state against any railroad company which should charge more for the transportation of a passenger or freight for any distance within the state, the same or a greater amount than that charged for a greater distance, was reversed. The suit was based on the fact that the company charged certain shippers more in a contract for the transportation of goods from Gilman, Ill., to New York, than it did other shippers in a contract made the same day for a like shipment from Peoria, Ill., to New York, a greater distance by eighty-six miles.

It is said:

"It might admit of question whether the statute of Illinois, now under consideration, was designed by its framers to affect any other class of transportation than that which begins and ends within the limits of the state. The Supreme Court of Illinois having in this case given an interpretation which makes it apply to what we understand to be commerce among the states, although the contract was made within the state of Illinois, and a part of its performance was within the same state, we are bound, in this court, to accept that construction."

"We think it may safely be said that state legislation, which seeks to impose a direct burden upon inter-state commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion occupies that position.

"While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage.

"It is not the railroads themselves that are regulated by this act of the Illinois legislature, so much as the charge for transportation."

In *Hanley vs. the Kansas City Southern Ry. Co.*, decided Jan. 5, 1903, (23 S. C. Rep., page 214.) it was held that the railroad commission of Arkansas cannot, without violating the commerce clause in the Federal Constitution, fix and enforce rates for the continuous transportation of goods between two

points within the state, where a part of the route is outside of the state through the Indian Territory.

Decisions relating to taxation of inter-state business, or of the receipts therefrom, are in point under the following statement in the opinion in the case of *The Wabash, St. Louis & Pacific R. Co. vs. Illinois, 118 U. S., 557.*

> "It is impossible to see any distinction in its effect upon commerce of either class (foreign or inter-state) between a statute which regulates the charges for transportation, and a statute which levies a tax for the benefit of the state upon the same transportation."

The case which is most nearly in point is that of *Fargo, president of the Merchants' Dispatch Transportation Co., vs. Stevens, Auditor General of the State of Michigan, 121 U. S., 230.*

> In that case the judgment of the Supreme Court of Michigan, sustaining the demurrer to the bill filed by Fargo, as president, and dismissing the bill, was reversed. The bill was filed to enjoin the auditor general from collecting taxes assessed on the gross receipts of the transportation company named, which was a joint stock company, organized under the laws of the state of New York. The taxes were assessed under a statute of Michigan, which provided that such companies should make reports to the commissioner of railroads of the state, and that the commissioner should annually file with the auditor general a computation of the amount of tax to be paid by it, under the statute, viz., two and one-half per cent. upon its gross receipts, as computed by the commissioner of railroads. The company named was assessed $722.25 upon its earnings for 1883. Its report showed that the earnings of the company for that year were $124,604.51; that of that sum, $95,714.50 was earned in transportation of freight between points out of the state, and passing through the state in transit, and $28,890.01 in the transportation of freight between points without the state and points within the state. All these sums were so-called "Michigan proportion of earnings," estimated and pro rated according to the mileage of the transportation within the state. The tax was assessed on the sum of $28,890.01, the Michigan proportion of earnings for transpor-

tation which originated or terminated within the state. The complainant in the bill contended that the statute was void as a regulation of commerce among the states. That contention was sustained by this court.

In the opinion is this statement:

"With reference to the utterances of this court, until within a very short time past, as to what constitutes commerce among the several states, and also as to what enactments by the state legislatures are in violation of the constitutional provision on that subject, it may be admitted that the court has not always employed the same language, and that all of the judges of the court who have written opinions for it may not have meant precisely the same thing. Still, we think the more recent opinions of the court have pretty clearly established principles upon that subject which can be readily applied to most cases requiring the construction of the constitutional provision, and that these recent decisions leave no room to doubt that the statute of Michigan, as interpreted by the Supreme Court in the present case, is forbidden as a regulation of commerce among the states, the power to make which is withheld from the state."

135 U. S., 161, Lyng vs. The People of the State of Michigan.

In this case the judgment of the Supreme Court of Michigan, affirming the conviction of Lyng for violation of a state law imposing a tax to be paid by persons engaged in selling liquors, was reversed. Lyng was agent in Michigan of a firm of brewers located in Wisconsin. The firm had a warehouse in Michigan, to which beer was shipped from Wisconsin and stored, and from which it was sold and delivered. This court held that he was merely the representative of the importers, and that he was not subject to the tax. In the opinion is this sentence: "We have repeatedly held that no state has the right to lay a tax on inter-state commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce,

and amounts to a regulation of it, which belongs solely to Congress." This statement is also made in 127 U. S., 640, Leloup vs. The Port of Mobile, and many cases are there cited.

122 U. S., 326, Philadelphia & Southern Mail Steamship Co. vs. Pennsylvania.

In the opinion in this case the question for decision is said to be, "Whether a state can constitutionally impose upon a steamship company, incorporated under its laws, a tax upon the gross receipts of such company derived from the transportation of persons and property by sea between different states and to and from foreign countries." A statute of the state imposed upon such companies a tax of 8-10 of one per centum upon their gross receipts for tolls and transportation, telegraph business and express business. The companies were required to make reports to the auditor general, of their gross receipts. Upon reports of the company, party to the suit, taxes were assessed upon its gross receipts for certain years, all of which were derived from freight and passage money between Philadelphia and Savannah, and in foreign trade from New Orleans. It was held that this transportation was inter-state and foreign commerce; that the state could not constitutionally regulate or interfere with that commerce; that taxing is one of the forms of regulation; that "taxing the transportation, either by its tonnage or distance, or by the number of trips, or in any other way, would certainly be a regulation of commerce, a restriction upon it, a burden upon it, and that clearly this could not be done by the state without interfering with the power of Congress. The question, "If the state cannot tax the transportation, may it nevertheless tax the fares and freights received therefrom?" is answered in the negative. It is further said that, "If the regulation of the transportation belongs to the power of Congress to regulate commerce, the regulation of fares and freights receivable for such tranportation must equally belong to that power, and any burdens imposed by the state on such receipts must be in conflict with it. The tax in the present case is laid upon the gross receipts for transportation as such," and, "if such a tax is laid, and the receipts are those derived from transportation of goods and passengers in the way of inter-state or foreign commerce, no matter when the tax is exacted * * * it is an exaction aimed

at the commerce itself, and is a burden upon it, and seriously affects it."

"Referring to the *State tax on railway gross receipts," 15 Wallace (82 U. S.) 284*, it is said, "A review of the question convinces us that the first ground on which the decision in *State Tax on Railway Gross Receipts* was placed, is not tenable." "It was held by this court in the case of *Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196*, that inter-state commerce carried on by corporations is entitled to the same protection against state exactions which is given to such commerce when carried on by individuals."

The following sentence is quoted from *8 Wall, 168, Paul vs. Virginia:* "While it is conceded that the property in a state, belonging to a foreign corporation, engaged in foreign or inter-state commerce, may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed upon the property of either corporation, because it is used to carry on that commerce, *or upon the transportation of persons or property*, or for the navigation of the public waters over which the transportation is made, is invalid and void as an interference with, and obstruction of, the power of Congress in the regulation of such commerce."

It is further said that the decision in that case, and the reasoning on which it is founded, so far as they relate to the taxation of inter-state commerce carried on by corporations, apply equally to domestic and foreign corporations, and that "their business, as carriers in foreign or inter-state commerce, cannot be taxed by the state, under the plea that they are exercising a franchise."

Further, "The corporate franchises, the property, the business, the income of corporations created by a state, may undoubtedly be taxed by the state; but in imposing such taxes, care should be taken not to interfere with or hamper, directly or by indirection, inter-state or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal Government. This is a principle so often announced by the courts, and especially by this court, that it may be received as an axiom of our constitutional jurisprudence. It is unnecessary, therefore, to review the long list of cases in which the subject is discussed." Many cases are cited in the opinion, following the statement just quoted, and it is said that, "The cases of *Moran vs. New Orleans*, and *Fargo vs. Michigan*, are especially apposite to the case now under consideration."

Other cases are cited "as showing the power of the states over local matters incidentally affecting commerce."

The question for decision, stated at the beginning of the opinion, was answered in the negative. The opinion closes with the sentence, "Our conclusion is that the imposition of the tax in question in this cause was a regulation of inter-state and foreign commerce, in conflict with the exclusive powers of Congress under the constitution," and the judgment of the Supreme Court of Pennsylvania was reversed.

It has also been decided that a state statute, requiring the payment of a license fee for the privilege of doing business in the state by a corporation engaged in inter-state business, and at the same time in local business within the state, is invalid; that the exaction of a license fee is a tax on the occupation, and therefore on the business; that the fact that part of the business is internal to the state does not remove the difficulty, because the tax affects the whole business, inter-state and local, without discrimination.

127 U. S., 640, Leloup vs. Port of Mobile.

Business of the Western Union Telegraph Co. in Alabama.

141 U. S., 47, Crutcher vs. Kentucky.

Business of the United States Express Co. in Kentucky.

Caldwell vs. the State of North Carolina, decided Jan. 12, 1903. (23 S. C. Rep., page 229.)

A license fee, required by the charter of the city of Greensboro, to be paid by the resident agent of a foreign corporation.

"Commerce between the states, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation."

Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 204. Citing 118 U. S., 557.

"If Congress has not made any express regulations with regard to inter-state commerce, its inaction, as we have often held, is equivalent to a declaration that it shall be free in all cases where its power is exclusive."

122 U. S., 326, Philadelphia etc. Co. vs. Pennsylvania.

V.

Fifth point. The Supreme Court of Michigan erred in sustaining the demurrer to the answer.

It was sustained upon ground predicated of the fact that the defendant was incorporated in 1896, after the enactment of the statute fixing the present rates, as an amendment to the general railroad law in 1889. In sustaining the demurrer the court necessarily overruled the objections on constitutional grounds set forth in the answer, (1) that the statute, as construed, violates the XIV amendment; (2) and the provision relating to inter-state commerce, and (3) that the rate is unreasonable, and its enforcement would deprive the respondent of its property, in violation of the XIV amendment.

The first two of these objections were passed over by the court. The third is the only one considered and expressly decided.

The court nevertheless, necessarily overruled all the objections. They are fully set forth in the answer.

It will first be determined whether or not the objections that the statute as construed conflicts with the XIV amendment, and with the commerce clause in the constitution, are well taken.

There can be no question upon this record that the rate is, in fact, unreasonable, and it is well settled by the decisions of this court that the enforcement of an unreasonable rate upon a carrier, deprives it of its property, in violation of the XIV amendment.

The objection under the commerce clause is pertinent. It is averred in the answer, and therefore admitted, that the earnings of the company in 1900, excluding all inter-state fares, did not amount to $2,000 per mile of road. The company would not, by the terms of the statute itself, be subject to the two and a half cent rate if the inter-state fares were omitted.

The decision that inter-state fares must be included in the gross earnings, was rendered in 1901, five years after the

incorporation of the defendant company. That is the construction of the statute which places it in conflict with the commerce clause, as we allege. If the objection on that ground is sustained by this court, it cannot be contended on any possible theory that the defendant is precluded by its incorporation in 1896 from the objection that the construction given to the statute five years later is a violation of the provision in the constitution relating to inter-state commerce.

The Supreme Court of Michigan, notwithstanding these objections, has ordered that mandamus issue to enforce the rate upon the company.

That action, *prima facie* at least, violates the constitutional provisions, and does so conclusively unless the state shall justify it.

The burden is upon the defendant in error in this case to establish a valid reason which will control the constitutional provisions, and make lawful the enforcement of the rate in question, which is on its face a violation of them.

Any reason which could be assigned to support the judgment enforcing the unreasonable rate must rest upon some provision in the National Constitution controlling that in the XIV amendment, or upon some decision of this court giving to that amendment an interpretation which limits its universal application. It could not rest upon state laws, nor upon any construction of those laws by the courts of the states, nor upon any decisions of state courts declaring any rule of general law.

The only reason set up by the representatives of the state to defeat the operation of the constitutional provision in this case is the fact that the defendant became incorporated after the present section, relating to rates, was enacted by amendment of the law.

The reasons stated in the opinion of the Supreme Court for sustaining the demurrer are:

"That the fixing of unreasonable rates is an infringment of the property rights of an existing corporation, within the meaning of the XIV amendment, appears to have been determined by the Federal Supreme Court in," certain cases cited. Among others, the Minnesota case, 134 U. S., 418, and the

Kentucky Turnpike Road case, 164 U. S., 578. "We do not find it necessary to discuss this question (how far and in what respects a law authorizing an incorporation is a contract) at length, for in our view it cannot admit of doubt that corporations formed under an existing law will not be heard to question the rates fixed by the statute."

It is also said that the unreasonable rate could not be enforced upon the original company which was incorporated before the present statute as to rates was enacted in 1889, and that "the case turns upon the question of whether the respondent is (by virtue of the provision in the section under which it is incorporated, that corporations organized by purchasers of railroad property at mortgage sale shall have all the rights of the original company whose property was sold under the mortgage) in position to insist that it occupies precisely the same ground that the former corporation would but for the foreclosure."

That question is not expressly decided. The opinion proceeds (p. 63) to discuss the question whether or not the legislature could, by the amendment of 1889, after the mortgage was made, withdraw from the bondholders the right to reorganize, except on condition of submitting to unreasonable rates, and it is decided that the legislature could, after the mortgage was given, amend the statute and fix rates which would be unreasonable, as a condition of incorporation thereafter, and that such a provision would affect the remedy only, and not the right of property.

The statement in the opinion (p. 63) that, "In our view it cannot admit of doubt that corporations formed under an existing law will not be heard to question the rates fixed by the statute," is asserted upon decisions in which it has been held that "corporations cannot avail themselves of the provisions of the law which give them the right to do business, and disregard those provisions which are onerous." That is true as a general rule, but it does not reach the question in this case, in which the objection to the provision in the statute is that it conflicts with the constitution of the United States. In so far as this statement depends upon the declaration which precedes it,

that this court has decided that the enforcement of unreasonable rates is a violation of the constitution only as to corporation organized before the passage of the statute, it must stand or fall with it.

The decision of the court rests fundamentally upon the statement in the opinion that this court "appears" (in the cases referred to) to have decided that the enforcement of unreasonable rates is unconstitutional only as to corporations organized before the passage of the statute fixing such rates

That statement is erroneous.

This court has never so decided in any case.

There is nothing in any of the cases decided by this court which supports the interpretation given to those decisions by the Supreme Court of Michigan in the statement just referred to.

This court has decided that the enforcement of unreasonable rates upon a corporation owning railroad property would deprive it of its property in violation of the constitution. The decisions are not placed on the ground that the corporations were organized before the enactment of the unreasonable rates. They have no reference to that point at all. The ground of the decisions is that the owner of property employed in the service of the public is entitled to a just and reasonable compensation for its use, and that a state statute which deprives the owner of that compensation, and imposes unreasonable rates, violates the provision in the XIV amendment. No distinction between corporations, depending upon the time of their incorporation under general laws, has ever been expressly declared or recognized by this court in any decision relating to the enforcement of unreasonable rates.

The Supreme Court of Michigan being in error in the statement which is the basis of its decision, and upon which its judgment must rest, it occurs to us that this brief might properly end at this point. Any further discussion would be in anticipation of what may be said in behalf of the defendant in error on this hearing.

It certainly cannot be claimed that this court has decided that the imposition of unreasonable rates is unconstitutional

only as to corporations organized before the passage of the statute fixing such rates.

The only thing that counsel for the defendant in error can do is to contend that this court should now decide, as an original proposition, that corporations organized under general laws of a state which may be altered, amended or repealed under power reserved, are subject to provisions in those laws which are in conflict with the Federal Constitution, if organized after the enactment of such provisions, even if they should be thereby deprived of their property rights under that constitution. It seems that the contention of the state cannot rest upon any narrower ground than this.

No decision of this court can be cited in support of that contention.

No reason appears why any distinction should be made respecting the enforcement of unconstitutional provisions between corporations organized under laws which are subject to alteration, amendment and repeal, because of the time of their incorporation as before or after the enactment of those provisions. When power to amend or alter the incorporation law is reserved, a provision enacted after the organization of any corporation is as binding upon that corporation as one enacted before. The fact that corporations have been organized under the law does not operate as a restraint upon the power of the legislature to amend and alter the law. But the legislative action is in all cases subject to the constitutional limitations.

If the contention suggested shall be presented by counsel for defendant in error we shall submit in opposition thereto,

1. The supreme authority of the National Constitution prevails at all times and places. That constitution must be read, together with every law of a state, to determine the rights of persons and property under such law. Rights which are within its protection cannot be taken away or impaired by the state under any circumstances. A corporation cannot be said to surrender its property rights under the constitution by becoming incorporated under a state law, any more than an individual surrenders his personal rights under the constitution

by becoming a citizen of the state and subjecting himself to its laws. The constitutional provisions are paramount always, and state ordinances and enactments must yield to them.

2. That it is not competent for the legislature of a state, in passing laws authorizing corporations to be organized, or foreign corporations to do business within the state, to impose conditions upon either which are repugnant to the constitution of the United States, or which would deprive them of any right under that constitution, and that corporations do not become subject to the enforcement of such conditions by organizing or engaging in business under the laws of which such conditions form a part.

This court has decided that provisions in a state law, which impose upon foreign corporations conditions which are in conflict with the constitution, cannot be enforced against a corporation which avails itself of the law, even after the enactment of such a provision.

It has been so held respecting conditions against the removal of suits to the Federal courts.

126 U. S., 186. Barrow vs. Burnside.

146 U. S., The Southern Pacific Co. vs. Denton.

Also as to conditions attached to the right to carry on inter-state commerce.

141 U. S., 47. Crutcher vs. Kentucky.

The last sentence in Barron vs. Burnside is,

"In all the cases in which this court has considered the subjct of the granting by the state to a foreign corporation of its consent to the transaction of business in the state, it is uniformly asserted that no conditions can be imposed by the state which are repugnant to the constitution and laws of the United States."

In Crutcher vs. Kentucky, it was said:

"If a partnership firm of individuals should undertake to carry on the business of inter-state commerce between Kentucky and other states, it would not be within the province of the state legislature to exact conditions on which they should carry on their business, nor to require them to take out a license therefor. To carry on inter-

> state commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States; *and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right*, unless Congress should see fit to interpose some contrary regulation on the subject."

The right to a just compensation for the use of property is one as sacred under the National Constitution, and as fully within its protection, as the right to carry on inter-state commerce, or to remove a suit to the Federal Courts. Congress itself has no control over it. It must necessarily follow that a condition imposing unreasonable rates, in whatever form it may appear, is void equally as conditions affecting the other rights under the constitution. The same principle applies to all rights under the constitution.

It is not any more competent for a state legislature to impose unconstitutional conditions upon a domestic corporation, than to impose such conditions upon foreign corporations allowed to do business within the state.

If provisions in the laws of a state, which are in conflict with the constitution, can be enforced upon corporations organized after their enactment, the rule would apply against all provisions in the constitution. A statute actually fixing rates for inter-state fares could be enforced as well as one imposing unreasonable rates.

3. It is true, as a general rule, that corporations organized under the laws of a state are not subject to provisions in those laws which conflict with the constitution of the United States. There have been many cases in this court in which corporations have been protected against the enforcement of such provisions. In none of these has the decision been placed on the ground that the statute was passed after the organization of the corporation. There is no intimation in any case that a different rule would apply if the organization had taken place after the enactment of the law.

Instances of such cases appear in the citations under the

preceding second paragraph in this argument, relating to the enforcement of unreasonable rates.

The right to enforce the rate was not in any of these cases denied on the ground that the company was incorporated before the law by or under which the rate was fixed was passed. It was denied in every case, on the ground that the enforcement of an unreasonable rate would be a violation of the fourteenth amendment.

There could be no distinction regarding the authority of statutory provisions relating to corporations depending upon the time of their enactment, as before or after incorporation of any company, excepting in cases in which the right to amend or repeal the incorporation law was not reserved, and that distinction would rest upon the constitutional prohibition of laws impairing the obligation of contracts, and not upon the fourteenth amendment.

4. The power of the legislatures of the states to establish rates of fare is not absolute nor arbitrary. It exists, and can be exercised only within well defined limitations. A carrier has the right to fix its rates for passengers and freight, subject to the common law rule, that they must be reasonable. The power of the legislature is to protect the public against unreasonable rates, and in the exercise of that power the legislature cannot impose upon the carrier unreasonable rates.

173 U. S., 684, 698, Lake Shore & M. S. R. Co. vs. Smith.

169 U. S., 466, 527, Smyth vs. Ames.

In the last case, it is said, page 527, that "it cannot be admitted that the power granted (to establish maximum rates) may be exercised in derogation of the rights secured by the constitution of the United States," and on pages 527-528, that

"The duty rests upon courts, federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation."

In 134 U. S., on page 455, there is quoted from the decision

in Stone vs. The Farmers' L. & T. Co., 116 U. S., 307, 325, the sentence, "From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit," etc.

The power of the legislature under the Michigan constitution is to prescribe *reasonable* maximum rates.

5. The provision in the section of the statute under which the respondent company is incorporated (section 2 in article I.) that corporations organized by purchasers of railroad property at sales under mortgage shall be "subject" to all the provisions of the law and amendments thereto, does not add anything to the force or authority of the law. It is a declaration of the general rule of law that corporations are subject to the provisions of the acts under which they are incorporated. The defendant in this case, organized under that section, is subject to the provisions in the general railway law, of which that section is part, in the same manner and to the same extent, no more and no less, that it would be if the section did not contain that provision. It amounts to nothing more than a legislative declaration of the principle of the common law that corporations are subject to the laws under which they are incorporated. Such a declaration adds nothing to the force of the law.

108 U. S., 536, Ruggles vs. Illinois.

The defendant is not, by virtue of that provision, any more subject to a condition in the law which conflicts with the constitution of the United States, than it would be without it!

The provision is that such corporations shall be subject to all the provisions of the act, *and amendments thereto.* The claim that the provision binds a corporation to the rates prescribed by the statute, whether reasonable or not, would apply to every amendment of the rates passed after incorporation under the law, as well as those enacted before.

If it shall be decided that, as a general rule, corporations are subject to provisions in the state laws in conflict with the constitution, which are enacted before their incorporation, we shall contend that the defendant company in this case is not to be treated the same as a new corporation organized and building a railroad property after the amendment of the section as to rates, in 1889, and that the rate should not be enforced upon it because of the particular circumstances and the provisions in the laws under which the company became incorporated.

These have been fully stated in this brief, pages 4-7.

Attention is called to the following:

The sections in the laws of 1873 still in force, (1) giving companies power to mortgage their property, (2) authorizing purchasers of the property on mortgage sale to organize a corporation.

The construction of the railroad in the years 1870-1874.

The mortgage made by the company then owning the property on the 1st day of August, 1884.

The amendment, in 1889, of the section limiting rates of fares.

Sale of property on the mortgage, June 10, 1896.

Certificate of incorporation by the purchasers, July, 1896.

March, 1901, construction of the rate section by the Supreme Court. Inter-state fares must be included in gross earnings.

April, 1901, computation by the commissioner of railroads, of the gross earnings of the company in 1900, including part of inter-state earnings, makes them more than $2,000 per mile.

July, 1901, present proceeding for mandamus instituted to compel the company to reduce its fares.

The grounds upon which we shall claim that the rate cannot be enforced upon this company are,

1. The right to a reasonable compensation for the use of property employed in the service of the public is an attribute of the property itself, under the XIV amendment, and inseparable from it. It inures for the benefit of every owner of the property by whom it may be lawfully acquired and held. The company in this case has, under the laws of Michigan and

Indiana, become the owner of the property, with all the rights pertaining to it. The right to just compensation attached to this property as soon as it was brought into existence, and has adhered to it through all changes in ownership. It could not be taken away or impaired by the state under any circumstances. The company, as owner of the property, has the right of objection to the unreasonable rate, independent of any pre-existing right in the original company.

2. The provision in the statute now sought to be enforced, although enacted before the incorporation of the company in 1896, was not operative as to the property at the time of such incorporation, and was not claimed to have become operative until six years thereafter, in 1902. It then became operative only by reason of the decision of the Supreme Court in 1901, that part of the inter-state earnings must be included in the gross earnings for the purpose of determining the rates to be charged under the statute.

In *171 U. S., 361, Smyth vs. Ames*, it was said that "The reasonableness of a schedule of rates must be determined by the facts as they exist when it is sought to put the rates into operation."

This case clearly comes within that rule.

The time when a provision in a statute becomes operative is the time when the right of objection is to be determined in cases in which the objection rests upon matters of fact.

The question whether a rate is reasonable or not is one of fact.

And is to be determined by the circumstances and conditions as they exist at the time when the statute, by its terms, becomes operative, and its enforcement is attempted.

If the owner of the property can then show that the rate would be unreasonable, it will not be held to be precluded from that ground of objection because the statute was enacted before its incorporation.

The statute does not fix a single uniform rate, but a schedule of rates, three cents, two and a half cents, and two cents, according to earnings.

Three cents was, when the company was incorporated, and

is now, a reasonable rate for fares upon its railroad, and is the rate which has always been charged. When the company was incorporated, and for six years thereafter, it was, by the terms of the law, allowed to charge the three cent rate.

The rates are fixed by the statute, according to gross earnings, without reference to any other fact, and are arbitrary. This method of fixing rates is not one calculated to secure rates which are reasonable. Other things, such as the cost of construction and of maintenance and of operation, are material elements. Those of each property will vary from others. The rates prescribed may be reasonable for one railroad, and not reasonable for another. Each case will present its own facts.

It could not be said, when the company was incorporated, whether the two and a half cent rate would, when it should become operative, if ever, by the terms of the statute, be reasonable or not. It might be and it might not, under facts and conditions then existing. The company is not, under the circumstances, precluded by the fact of its incorporation from now showing, when it is claimed that the provision has become operative and it is attempted to enforce it, that the rate under existing conditions would be unreasonable, and from insisting upon the constitutional objection on that ground.

3. The provision in the section of the law under which the company became incorporated, that "such corporations, when organized, shall have the same rights, powers and privileges as are or may be secured to the original company whose property may have been sold under and by virtue of such mortgage." The entire section appears in this brief, pages 5 and 6.

The right in question is the right to just compensation for the use of the property, and to resist the imposition of an unreasonable rate. That right is one possessed by the original company. It is not a right or privilege derived from the state, but is one under the National Constitution.

This provision in the law is material only as an answer to the claim by the relator that the company, by its incorporation, became subject to the law so as to be precluded from the objection that the rate is unreasonable.

It is referred to in the opinion, but there is no express decision by the court as to its effect. After reciting the section and stating the defendant's claim under it, the opinion turns to the question of the power of the legislature to reduce fares after the making of the mortgage.. That question is decided in favor of the power to reduce fares to an unreasonable extent, and it is the only point that is expressly decided in the opinion. Other rules as stated are assumed to be the law.

4. Section 8552, Compiled Laws (sec. 26, in the chapter "General Provisions Relating to Corporations"). This section is given in full in this brief on pages 6 and 7. It applies to all corporations. It provides that purchasers of corporate property on mortgage sale

> "Shall be entitled to have and exercise all the privileges and franchises held by such corporation, and shall be deemed and taken to be the true owners of its corporate rights, and to be corporators *vested with all the rights, powers, privileges, and benefits conferred by law or the statutes of this state upon such corporations in the same manner and to the same extent as if they were the original incorporators.*"

It requires that they shall form a new corporation in the manner prescribed by the section. That method is to be followed in all cases, excepting those in which the act relating to particular corporations prescribes some other method of forming the new corporation by the purchasers. The railroad law does contain such a provision, and it was followed in this case.

5. *Rights of the original company, and of the bondholders and purchasers.*

The bonds were issued and the mortgage made in 1884, before the section relative to rates was amended in 1889.

It is conceded that the rate in question could not be enforced against the company which made the mortgage, if it still owned the property, and that it could successfully defend the present attempt to enforce the rate, on the ground that it is unreasonable.

The holders of the bonds, or the trustees in the mortgage, would have the same rights.

The case of *Reagan vs. the Farmers' Loan & Trust Co., 154 U. S., 362*, was upon bill by the trustees in a trust deed securing the bonds of a railroad company, to enjoin the railroad commission of the state of Texas from enforcing rates of freight fixed by the commission under a statute of the state, on the ground that they were unreasonable. The decree perpetually enjoining the comimssion, as prayed, was affirmed by this court.

The bondholders secured by the mortgage of 1884 on the property in the present case, or the trustees in the mortgage, could, if the bonds were still outstanding and the mortgage not foreclosed, maintain a like suit to enjoin the enforcement of the rate in question, on the ground that it is unreasonable.

It is also true, and is conceded, that the purchasers at the sale under the mortgages would have the same right that the corporation which made the mortgage would have, to resist the enforcement of this rate.

We have in the case these facts:

The existence of the railroad property since about 1872.

The sections in the railroad law of 1873, giving railroad companies power to mortgage their property, and the purchasers on mortgage sale power to organize a corporation for the ownership and management of the property.

Section 9, in the law of 1873, limiting fares to three cents per mile.

The mortgage, August 1, 1884.

The amendment of section 9, as to rates, in 1889.

The point expressly decided by the Supreme Court in its opinion, is that the legislature could, after the mortgage was made, withdraw from the bondholders the right to re-organize except on the condition of submitting to the rates fixed by the statute, even if unreasonable.

The court puts the contention of the defendant in the form which appears in the statement in the last paragraph on page 63, "It is contended that the legislature could not, by the amendment of 1889, withdraw from the bondholders the right to reorganize, except on condition," etc.

The question, as we understand it, is whether or not the

defendant is, by its incorporation, precluded from the objection that the rate is unreasonable, and is much broader than the contention as stated in the opinion.

We do not claim that the present company has the right to charge three cents per mile because the original company charged it. The objection to the two and a half cent rate is that it is unreasonable.

We do not question the power of the legislature to reduce fares after the making of the mortgage, the general law being subject to amendment or repeal. Our contention is that it could not reduce them so that they would not afford a reasonable compensation for the use of the property, and that it would be competent for any party owning or having a substantial pecuniary interest in the property, to resist the enforcement of the rates fixed by the amendment, if unreasonable. The original company, the trustees in the mortgage, the bondholders secured by the mortgage, and the purchasers at the mortgage sale could do it, and the corporation organized by the purchasers would have the same right.

The Supreme Court decided that the legislature could, after the mortgage was made, withdraw from the bondholders the right to reorganize, except on condition of submitting to unreasonable rates, that such legislation would affect the bondholders' remedy only, and not any right of property, for the reasons: (a) That the purchasers, upon the foreclosure sale, independent of any express statutory authority, were authorized to maintain their property rights and operate the railroad in accordance with the franchise of the original company, and under the same conditions, and the authority to incorporate was not essentially a part of the property right, but was a privilege granted by the state, which might be withdrawn. (b) That the legislature possessed the power to repeal the statute, and could do that, either before or after the reorganization, and thereby deprive the purchasers of the power of reorganization. (Page 64.)

The statement that the purchasers had the right to operate the railroad as a corporation under the franchise of the old company, without reorganization, is erroneous. Section 26

in the chapter "General Provisions Relating to Corporations" prohibits that. The section is printed in this brief on pages 6 and 7.

The statement that the legislature had power to repeal the law is immaterial. The law has not been repealed. It remains in force. The defendant is incorporated under it, and the question is its right, in view of that incorporation, to object to the rate as unreasonable.

The decision that the legislature could deprive the purchasers of the right to reorganize, except on condition of submitting to the rates fixed by the statute, even if unreasonable, is wrong in principle. The right of the purchasers to incorporate is retained in the statute. The legislature could not attach to it any condition requiring the corporation to carry at unreasonable rates, nor any other condition in conflict with the National Constitution.

6. This company is not claiming any mere exemption or immunity which was possessed by the former company. It is insisting upon a right under the constitution. Cases in which it has been held that exemption from taxation and like privileges do not pass to purchasers at sales under mortgages, have no application in this case.

We respectfully submit that the judgment of the Supreme Court of the state of Michigan, ordering that mandamus issue to compel the plaintiff in error to reduce its rates of passenger fares to two and a half cents per mile should be reversed, and such further order made as may seem proper to this court.

T. J. O'BRIEN,

JAMES H. CAMPBELL,

For Plaintiff in Error.